FILED
OCT 6 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 436

BIRDIE MAE DAVIS, et al.,
Petitioners,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.,

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

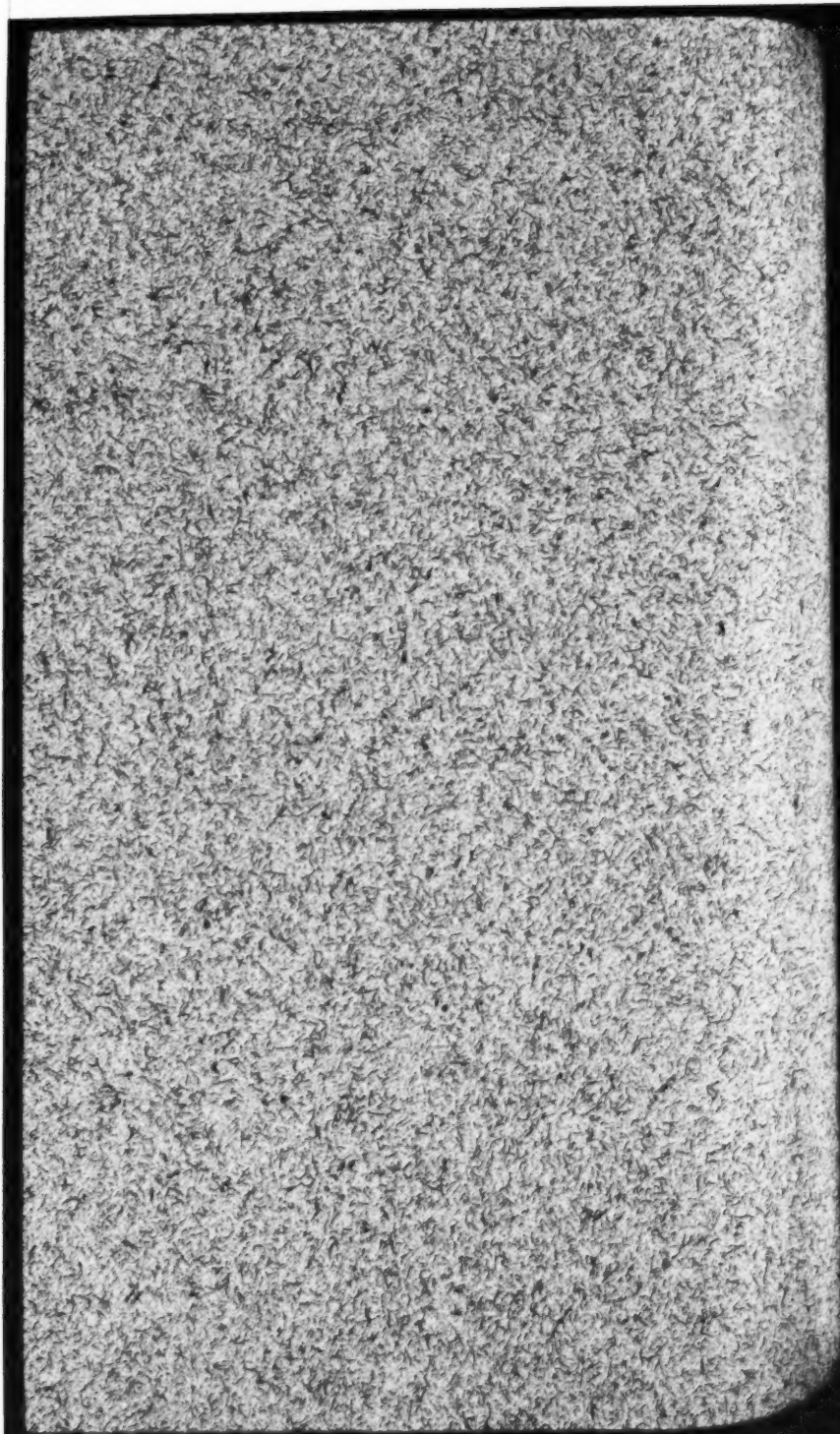
BRIEF

For the Little Rock School District and the North Little Rock School District, Amici Curiae

ROBERT V. LIGHT
1100 Boyle Building
Little Rock, Arkansas 72201
Attorney for Amici Curiae

Of Counsel
HERSCHEL H. FRIDAY
G. ROSS SMITH
1100 Boyle Building
Little Rock, Arkansas 72201

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-621-4477



INDEX

Page

Authority to File ..... This page

Table of Cases ..... This page

Interest of Amici Curiae 1

Argument 4

Conclusion 14

AUTHORITY TO FILE

The Little Rock School District and the North Little Rock School District are public bodies corporate created under the laws of Arkansas. Ark. Stats. 80-402. They are political subdivisions of the State of Arkansas and this brief is sponsored by their authorized attorney. This brief is therefore filed pursuant this Court's Rule 42 (4).

Table of Cases

Avery v. Wichita Independent School District, 241 F. 2d 230 (5th Cir. 1957) 6

Bell v. School City of Gary, Ind., 213 F. Supp. 819 (N. D. Ind.), aff'd 324 F. 2d 209 (7 Cir. 1963), cert. denied, 377 U. S. 924 ..... 6, 8

Bowman v. County School Board, 382 F. 2d 326 (4th Cir. 1967) 6

Borders v. Rippy, 247 F. 2d 268 (5th Cir. 1957) 6

Bradley v. School Board of City of Richmond, 317 F. 2d 429 (4th Cir. 1963), rev'd. on other grounds 382 U. S. 103 6

Broussard v. Houston Ind. S. Dist., 395 F. 2d 817 (5 Cir. 1968) 8

Brown v. Board of Education, 139 F. Supp. 468 (D. C. Kan. 1955) 5

Brown v. Board of Education, 349 U. S. 294 .....1, 4, 5

Carr v. Corning, 182 F. 2d 14 (D. C. Cir., 1950) 13

Clark v. Board of Education, 369 F. 2d 661 (8th Cir. 1966), on rehearing 374 F. 2d 569 (8th Cir. 1967).. 6

Clark v. Board of Education of Little Rock School Dist., 426 F. 2d 1035 (8 Cir., 1970) 2

Deal v. Cincinnati Board of Education, 369 F. 2d 55 (6th Cir. 1966), cert. denied, 389 U. S. 846 .....6, 7, 8

Downs v. Board of Education, 336 F. 2d 988 (10th Cir. 1964), cert. denied, 380 U. S. 914 ..... 6, 8

Jeffers v. Whitley, 309 F. 2d 621 (4th Cir. 1962) 6

Moses v. Washington Parish School Board, 276 F. Supp. 834 (D. C. La. 1967) 6

Springfield School Committee v. Barksdale, 348 F. 2d 261 (1st Cir. 1965) 6, 8

Swann v. Charlotte-Mecklenburg Board of Education, 369 F. 2d 29 (4th Cir. 1966) 6, 8

United States v. Jefferson County Board of Education, 372 F. 2d 836 (5th Cir. 1966), on rehearing en banc 380 F. 2d 385 (5th Cir. 1967), cert. denied, 389 U. S. 840 ..... 6, 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 436

BIRDIE MAE DAVIS, et al.,
Petitioners,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

BRIEF

For the Little Rock School District and the North Little Rock School District, Amici Curiae

INTEREST OF AMICI CURIAE

The Little Rock and North Little Rock school districts, urban school districts serving a total of about 37,000 students, have attempted both compliance with their obligations arising from **Brown v. Board of Education,**[1]

[1] 349 U. S. 294.

and preservation of a viable and effective educational program, by assignment of students to schools in the neighborhoods where they reside without racial classifications of any kind. Both districts have been frustrated in such efforts by federal court orders requiring arbitrary manipulations of student assignments directed toward achieving greater degrees of "racial balance" within the various schools. Each is presently subject to a district court order pertaining to the expenditure of school funds to transport certain students to schools distant from their homes,[2] and each is now before the Court of Appeals for the Eighth Circuit[3] defending claims that the Constitution requires abandonment of the neighborhood school concept by these districts because residential patterns result in some schools being "racially identifiable."

The Little Rock district has been required to bear the crushing burden of constantly defending in federal court its desegregation operations since 1956, and during that period has undergone multiple reorganizations to comply with the changing views of those courts respecting what the Constitution requires. In its most recent decision pertaining to this district announced May 13, 1970,[4] the Court of Appeals for the Eighth Circuit reversed a district court order approving residential zoning as the method of school assignment, and without furnishing any guidelines as to what would suffice directed the school authorities to do something else. The court was divided and the dissenting judges observed at page 1048:

> "Absent authoritative guide lines from the Supreme Court as to the constitutional status of neighborhood

---

[2] The district court's orders require the Little Rock district to bear this expense and strongly suggest that the North Little Rock district should do so.

[3] Oral arguments set for October 14, 1970.

[4] **Clark v. Board of Education of Little Rock School Dist.**, 426 F. 2d 1035 (8 Cir., 1970).

schools in metropolitan districts, the Board upon remand would be at a loss to know what course to take in devising a desegregation plan. The remand for the proposal and consideration of a new plan for desegregation, absent more specific guide lines, would only create confusion and lack of stability in the Little Rock school system."

A petition for certiorari has been filed here (O. T., 1970, No. 409), but has not been passed upon by this Court at the time of preparation of this brief.

The foregoing demonstrates the interest of these districts in this case and those with which it has been consolidated. This brief is filed in support of the constitutionality of the neighborhood school concept.

ARGUMENT

In Section IV of their brief petitioners urge the Court to declare, as a principle of constitutional law, that "**Every** black child is to be free from assignment to a 'black' school." Thus, the Court is no longer implored to give vitality to the promise of the Equal Protection Clause that all citizens are to enjoy equal rights without regard to race. The Court is now asked to return to racial classification to measure legal rights—a principle it deliberately and unanimously rejected in **Brown.**

The demands of counsel for petitioners for ever-changing construction of the Constitution with respect to desegregation are placed in proper perspective when viewed against what they urged the Constitution meant the last time they were in court—and the times before that.

They now say the Constitution mandates racial balance. In the early 1950's when Mr. Justice Marshall made the principal argument in **Brown,** they urged only that the state-imposed (required or permitted by statute and rigidly enforced by local school authorities) segregation of the races was in violation of the Constitution.[5] This Court agreed—and that was all that was condemned in **Brown.**

---

[5] Argument on December 9, 1952 in No. 101, October Term, 1952:

> Mr. Marshall: "But if this Court would reverse and the case would be sent back, we are not asking for affirmative relief. That will not put anybody in any school. The only thing that we ask for is that the state-imposed racial segregation be taken off, and to leave the county school board, the county people, the district people, to work out their own solution of the problem to assign children on any reasonable basis they want to assign them on." pp. 23-4.
>
> Mr. Marshall: "But my emphasis is that all we are asking for is to take off this state-imposed segregation. It is the state-imposed part of it that affects the individual children." p. 28.

The above reference is to the Transcript of Ward and Paul contained in the library of this Court.

As late as 1959, the principal counsel for petitioners in this case, and Mr. Justice Marshall's successor as chief counsel for the N. A. A. C. P. Legal Aid and Defense Fund, wrote:

> "Moreover, the jury discrimination precedents may be recalled: Bias may be presumed from a consistently segregated result; a token number of Negroes may be legally equivalent to none. If, however, in education there were complete freedom of choice or geographical zoning, or any other nonracial standard, and all Negroes still ended up in certain schools, there would seem to be no constitutional objection."

Jack Greenberg, **Race Relations and American Law**, Columbia University Press, New York (1959), pp. 239-40.

History, logic and the overwhelming weight of authority support the view that the Constitution, as construed in **Brown**, does not require affirmative race mixing nor does it condemn a school attended solely by Negroes.

As early as 1955, on remand of this Court's decision, **Brown v. Board of Education**, 139 F. Supp. 468 (D. C. Kan. 1955), rejected an assertion that the Constitution was violated by the maintenance of a school attended solely by Negroes, saying:

> "It was stressed at the hearing that such schools as Buchanan are all-colored schools and that in them there is no intermingling of colored and white children. Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.
>
> If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live."

This view has been approved and adopted by the Court of Appeals of every circuit where there has been significant litigation pertaining to school desegregation.[6]

It was not until **United States v. Jefferson County Board of Education**, 372 F. 2d 836 (5th Cir. 1966), on rehearing en banc 380 F. 2d 385 (5th Cir. 1967), cert. denied, 389 U. S. 840, that a different result was obtained. In that case, the Fifth Circuit reversed its former holdings and stated that:

> "As we see it, the law imposes an absolute duty to desegregate, that is, disestablish segregation. And an absolute duty to integrate, in the sense that a disproportionate concentration of Negroes in certain schools cannot be ignored; racial mixing of students is a high priority education goal." 372 F. 2d at 846-847, n. 5.

The decision was confirmed on rehearing en banc by a court divided 8-to-4. 380 F. 2d 385 (5th Cir. 1967).

After **Jefferson** there was chaos.[7] While most of the district courts and courts of appeals exhibited a disin-

---

[6] **Springfield School Committee v. Barksdale**, 348 F. 2d 261 (1st Cir. 1965); **Jeffers v. Whitley**, 309 F. 2d 621, 627 (4th Cir. 1962); **Bradley v. School Board of City of Richmond**, 317 F. 2d 429, 438 (4th Cir. 1963), rev'd. on other grounds 382 U. S. 103; **Swann v. Charlotte-Mecklenburg Board of Education**, 369 F. 2d 29 (4th Cir. 1966); **Bowman v. County School Board**, 382 F. 2d 326 (4th Cir. 1967); **Avery v. Wichita Independent School District**, 241 F. 2d 230, 233 (5th Cir. 1957); **Borders v. Rippy**, 247 F. 2d 268, 271 (5th Cir. 1957); **Deal v. Cincinnati Board of Education**, 369 F. 2d 55 (6th Cir. 1966), cert. denied, 389 U. S. 846; **Bell v. School Board**, 324 F. 2d 209 (7th Cir. 1963), cert. denied, 377 U. S. 924; **Clark v. Board of Education**, 369 F. 2d 661 (8th Cir. 1966), on rehearing 374 F. 2d 569 (8th Cir. 1967) and **Downs v. Board of Education**, 336 F. 2d 988 (10th Cir. 1964), cert. denied, 380 U. S. 914.

[7] A perceptive observation concerning **Jefferson County** appears in **Moses v. Washington Parish School Board**, 276 F. Supp. 834, 846-7 (D. C. La. 1967), where the court noted:

> "De jure segregation can be eradicated without ordering a wholesale mixing of the races and making that order a

clination to adopt its rationale, a sufficient number of them attempted to apply their interpretation of its teachings that there followed three school years of confusion and utter lack of uniformity in the manner in which southern school districts were required to operate. The ground rules changed every year—sometimes in the middle of the academic year. And the school districts were required to totally subordinate concern for their educational programs due to diversion of their energy and resources to reorganization after reorganization to comply with the deluge of ever-changing court orders.

The result is that the two school districts filing this brief *amici curiae,* and the respondent school district, have been judicially required to abandon the neighborhood school concept in part and stand in immediate jeopardy of being ordered to abadon it *in toto.* Thus these districts are denied the right to assign their public school students as students are assigned, and have been for decades, by the vast majority of the nation's school districts.

Even in **Jefferson** it was noted that "The neighborhood school system is rooted deeply in American culture." 372 F. 2d 836, 879. The Sixth Circuit Court said in **Deal v. Cincinnati Board of Education,** 369 F. 2d 55 (6 Cir. 1966), cert. denied, 389 U. S. 847 (1967), at page 60:

> "The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil

---

principle of constitutional law. And prejudice can be eroded and this nation united without dispensing with the legal and constitutional philosophy which is our unique and precious inheritance."

placement and administration through the use of neutral, easily determined standards, and better home-school communication."

The constitutionality of neighborhood school zoning plans has been upheld by many courts of stature although residential patterns produce racial imbalance in some of the schools. In addition to the decision of the Sixth Circuit Court in **Deal**, *supra*, and that of the Seventh Circuit Court in **Gary**, *infra*, see **Springfield School Committee v. Barksdale**, 348 F. 2d 261 (1 Cir. 1965); **Swann v. Charlotte-Mecklenburg Bd. of Ed.**, 369 F. 2d 29 (4 Cir. 1966); **Broussard v. Houston Ind. S. Dist.**, 395 F. 2d 817 (5 Cir. 1968), petition for rehearing en banc denied, 403 F. 2d 34 (5 Cir. 1968); **Downs v. Board of Ed. of Kansas City**, 336 F. 2d 988 (10 Cir. 1964).

Consistent with these court decisions, the Congress spelled out the national policy pertaining to racial considerations in public school assignment in unambiguous terms in the Civil Rights Act of 1964. The congressional intent is ably treated in the brief *amicus curiae* filed in **Swann v. Charlotte-Mecklenburg Board of Education** (O. T., 1970, No. 281) by Congressman Cramer and we add only a footnote here concerning the legislative history.[8]

---

[8] The legislative history establishes beyond doubt that it was the intention of Congress to adopt, and thus, confirm as the national policy, Judge Beamer's interpretation of the Constitution in **Bell v. School City of Gary, Ind.**, 213 F. Supp. 819 (N. D. Ind.), aff'd 324 F. 2d 209 (7 Cir. 1963), cert. denied, 377 U. S. 924. Senator Humphrey, manager of the Bill in the Senate, made this statement during the debate:

> "Judge Beamer's opinion in the Gary case is significant in this connection. In discussing this case, as we did many times, it was decided to write the thrust of the court's opinion into the proposed substitute." 110 Cong. Rec. 12715.

The "thrust" of the Gary decision was accurately described by Senator Humphrey to be:

> "I should like to make one further reference to the Gary case. This case makes it quite clear that while the Con-

There is absolutely no doubt that everyone involved in **Brown** contemplated that desegregation would involve attendance zones drawn without regard to race. This colloquy between Justice Frankfurter and Mr. (now Justice) Marshall during the argument of Brown on December 9, 1952 makes this clear:

"Justice Frankfurter: You mean, if we reverse, it will not entitle every mother to have her child go to a non-segregated school in Clarendon County?

Mr. Marshall: No, sir.

Justice Frankfurter: What will it do? Would you mind spelling this out? What would happen?

Mr. Marshall: Yes, sir. The school board, I assume would find some other method of distributing the children, a recognizable method, by drawing district lines."

* * * * * * *

"Mr. Marshall: I think, sir, that the decree would be entered which would enjoin the school officials from, one, enforcing the statute; two, from segregating on the basis of race or color. Then I think what ever district lines they draw, if it can be shown that those lines are drawn on the basis of color, then I think they would violate the injunction. If the lines are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint.

For example, the colored child that is over here in this school would not be able to go to that school.

---

stitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race. The bill does not attempt to integrate the schools, but it does attempt to eliminate segregation in the school systems." 110 Cong. Rec. 12717.

But the only thing that would come down would be the decision that whatever rule you set in, if you set in, it should not be on race, either actually or by any other way. It would violate the injunction, in my opinion.

Justice Frankfurter: There is a thing that I do not understand. Why would not that inevitably involve—unless you have Negro ghettoes, or if you find that language offensive, unless you have concentrations of Negroes, so that only Negro children would go there, and there would be no white children mixed with the, or vice versa—why would it not involve Negro children saying, 'I want to go to this school instead of that school'?

Mr. Marshall: That is the interesting thing in this procedure. They could move over into that district, if necessary. Even if you get stuck in one district, there is always an out, as long as this statute is gone."

* * * * * * * *

"Justice Frankfurter: I just wondered, in regard to this question that we are discussing, how what you are indicating or contemplating would work out in the District if tomorrow there were the requirement that there must be mixed groups.

Mr. Marshall: Most of the schools in the District of Columbia would be integrated. There might possibly be some in the concentrated areas up in the northwest section. There might be. But I doubt it. But I think the question as to what would happen if such decree was entered—I again point out that it is actually a matter that is for the school authorities to decide, and it is not a matter for us, it seems to me, as lawyers, to recommend except where there is racial discrimination or discrimination on one side or the other."

Transcript of Ward and Paul, pp. 23-28.

The other counsel aligned with Mr. Marshall in those cases agreed. Mr. Spottswood W. Robinson III arguing on behalf of the appellants in No. 191, O. T., 1952 urged:

> "Now, we submit that you cannot continue to discriminate against Negroes, or these Negro students; under the circumstances, what you do is, **you simply make all the facilities in the County available to all the pupils, without restriction or assignment to particular schools on the basis of race.**" (Emphasis supplied.)

Transcript of Ward and Paul, p. 22.

Mr. James M. Nabrit, Jr., arguing a year later on behalf of petitioners in No. 4, O. T., 1953 on December 9, 1953 described the relief sought as "a decree that these respondents be restrained from operating and managing these schools in the District of Columbia **on the basis of racial distinctions alone**" (emphasis supplied).
Transcript of Ward and Paul, p. 76.

A year and a half still later, Mr. Robert L. Carter arguing on behalf of petitioners in No. 1, O. T., 1954, on April 11, 1955 asserted that the decree to which he was entitled under **Brown I** was one that would require:

> "• • • the Topeka Board to cease and desist at once from basing school attendance and admission on the basis of race so that as of September, 1955 no child in Topeka would be going to school on the basis of race or color."

Transcript of Ward and Paul, p. 28.

On the same day Mr. George E. C. Hayes, arguing on behalf of petitioners in No. 4, O. T., 1954 read to the Court this policy that had been adopted by the District of Columbia Board of Education:

> "Attendance of pupils residing within school boundaries hereafter to be established, shall not be per-

> mitted at schools located beyond such boundaries except for the most necessitous reasons or for the public convenience, and in no event for reasons related to the racial character of the school within the boundaries in which the pupil resides."

Mr. Hayes then observed: "We read that to your Honors because we feel that is a very fine pronouncement of a policy." Transcript of Ward and Paul, pp. 54-5.

In his final argument in **Brown** on April 14, 1955 Mr. Justice Marshall was asked what would be required if the decree he sought were entered. He replied:

> "Well, I would say, sir, that the school board would sit down and take this position with its staff, administrative staff, superintendents, supervisors, et cetera. They would say 'the present policy of admission based on race, that is now gone. Now we have to find some other one.' The first thing would be to use the maps that they already have, show the population, the school population, then I would assume they would draw district lines without the idea of race but district lines circled around the schools like they did in the District of Columbia."

Transcript of Ward and Paul, pp. 430-1.

Counsel for petitioners have traveled a long and circuitious route from their arguments, accepted by this Court in **Brown,** that the Constitution condemns racial classifications in the public schools to the arguments now presented that the Constitution requires such classifications. If this Court should accept their proposition that the Constitution forbids "an identifiable racial minority school" then every bi-racial school district in the nation can expect to be hauled back to court every year *ad infinitum* for a determination of whether any of its schools meet that undefined standard, and the courts will labor with the same frustra-

tion trying to define that term as they have in trying to define the other glib rhetoric invented by counsel for petitioners such as "unitary schools", the "de jure-de facto" dichotomy, and "racial balance."

This Court clearly anticipated that its mandate in **Brown** would require establishment of residential attendance zones drawn without regard to race. Nothing it has said since has changed that, and the Constitution has not changed. The Congress has endorsed this method of school assignment and has condemned the assignment and transportation of students on racial classifications for the purpose of achieving racial balance.[9] Against this background it is almost incredible to read the arguments made here in support of what counsel for petitioners say the Constitution means now.

Counsel for petitioners argue in Section IV of their brief that the goal of judicial mandated abolition of all "black" schools must not be obstructed by consideration of the relevant facts. The factors they say must be judicially ignored are (a) transportation inconveniences and costs, (b) grade structures evolved by educators based on the experience of a century, (c) "neighborhood" associational values such as facilitation of P. T. A. meetings, and (d)

---

[9] The views expressed by Judge Prettyman in **Carr v. Corning**, 182 F. 2d 14, 16 (D. C. Cir., 1950), that it is the legislative branch, not the judiciary, that is best equipped to resolve problems arising out of racial coexistence are still supported by unassailable logic. He said:

> "Since the beginning of human history, no circumstance has given rise to more difficult and delicate problems than has the coexistence of different races in the same area. Centuries of bitter experience in all parts of the world have proved that the problem is insoluble by force of any sort. The same history shows that it is soluble by the patient processes of community experience. Such problems lie naturally in the field of legislation, a method of susceptible of experimentation, of development, of adjustment to the current necessities in a variety of community circumstance."

concerns that children not be sent to school in a "strange or hostile" neighborhood.

We respectfully urge that the integrity of the public school systems of the nation is too important to be crippled with judicially mandated educational and sociological experiments. *A fortiori* the nation's schools cannot afford such experimentation which at its very inception requires rejection of methods and practices recognized almost universally to be indispensible to the prime mission of the schools which is education.

CONCLUSION

Amici curiae urge that the Court declare, as it did in **Brown,** that the Constitution forbids racial classifications in the public schools.

Respectfully submitted

ROBERT V. LIGHT
1100 Boyle Building
Little Rock, Arkansas 72201
Attorney for Amici Curiae

Of Counsel
HERSCHEL H. FRIDAY
G. ROSS SMITH
1100 Boyle Building
Little Rock, Arkansas 72201